

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVELLOUS A. X. GREENE,

Plaintiff,

No. CIV S-05-0330 GEB JFM P

vs.

C. D. C., et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. On April 4, 2006, defendants filed a motion to dismiss for failure to exhaust administrative remedies pursuant to the non-enumerated part of Fed. R. Civ. P. 12(b) and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). On August 31, 2005, the court advised plaintiff of the requirements for opposing a motion pursuant to the non-enumerated part of Fed. R. Civ. P. 12(b). See Wyatt v. Terhune, 315 F.3d 1109, 1120 n.14 (9th Cir. 2003). In that same order, plaintiff was advised of the requirements for filing an opposition to the pending motion and that failure to oppose such a motion might be deemed a waiver of opposition to the motion.

On May 19, 2006, plaintiff was ordered to file an opposition or a statement of non-opposition to the pending motion within thirty days. In the same order, plaintiff was

1 informed that failure to file an opposition would result in a recommendation that this action be
2 dismissed pursuant to Fed. R. Civ. P. 41(b). On June 14, 2006 and July 20, 2006, plaintiff
3 received extensions of time to file and serve an opposition to the motion. The July 20, 2006
4 order set a final deadline of September 12, 2006 for the filing of plaintiff's opposition or
5 statement of non-opposition. That deadline has now expired and plaintiff has not responded to
6 the court's order.

7 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss
8 an action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258,
9 1260 (9th Cir.), cert. denied, 506 U.S. 915 (1992). “In determining whether to dismiss a case for
10 failure to comply with a court order the district court must weigh five factors including: ‘(1) the
11 public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket;
12 (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on
13 their merits; and (5) the availability of less drastic alternatives.’” Ferdik, at 1260-61 (quoting
14 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46
15 F.3d 52, 53 (9th Cir. 1995).

16 In determining to recommend that this action be dismissed, the court has
17 considered the five factors set forth in Ferdik. Here, as in Ferdik, the first two factors strongly
18 support dismissal of this action. The action has been pending for a year and a half and the court
19 has not yet issued a scheduling order due to the pendency of defendants' motion to dismiss.
20 Plaintiff's failure to comply with the Local Rules and the court's May 19, 2006 order suggests
21 that he has abandoned this action and that further time spent by the court thereon will consume
22 scarce judicial resources in addressing litigation which plaintiff demonstrates no intention to
23 pursue.

24 The fifth factor also favors dismissal. The court has advised plaintiff of the
25 requirements under the Local Rules and granted ample additional time to oppose the pending
26 motion, all to no avail. The court finds no suitable alternative to dismissal of this action.

1 Under the circumstances of this case, the third factor, prejudice to defendants
2 from plaintiff's failure to oppose the motion, should be given little weight. Plaintiff's failure to
3 oppose the motion does not put defendants at any disadvantage in this action. See Ferdik, at
4 1262. Indeed, defendants would only be "disadvantaged" by a decision by the court to continue
5 an action plaintiff has abandoned. The fourth factor, public policy favoring disposition of cases
6 on their merits, weighs against dismissal of this action as a sanction. However, for the reasons
7 set forth supra, the first, second, and fifth factors strongly support dismissal and the third factor
8 does not mitigate against it. Under the circumstances of this case, those factors outweigh the
9 general public policy favoring disposition of cases on their merits. See Ferdik, at 1263.

10 For the foregoing reasons, IT IS HEREBY RECOMMENDED that this action be
11 dismissed pursuant to Federal Rule of Civil Procedure 41(b).

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
14 days after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised
17 that failure to file objections within the specified time may waive the right to appeal the District
18 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

19 DATED: September 29, 2006.

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22 UNITED STATES MAGISTRATE JUDGE